

“Corporate Privilege” With No End in Sight – “And” Now?

INTRODUCTION

It is well-known fact that so-called “corporate privilege” in particular facilitates flexible personnel planning in a company in that it allows for the avoidance of visa duties and many other bureaucratic hurdles contained in the Temporary Employment Act (Arbeitnehmerüberlassungsgesetz or “AÜG”). Apart from the questions regarding compliance to European law, the restrictive substantive requirements of Sec. 1 (3) No. 2 AÜG have been the focus of debate because, under the Act, a person may “*not be hired and employed for the purpose of temporary assignments*”. It remained unclear, however, what the specific time restrictions of such possible temporary assignments were, but it was supposed to be clear that both the requirements of hiring “and” employment for the purpose of temporary assignments had to be present to cancel out corporate privilege.

JUDGMENT OF THE FEDERAL LABOR COURT OF NOVEMBER 12, 2024 – 9 AZR 13/24

The Federal Labor Court takes another view. Pointedly, in brief terms and in the Court’s own words: “*Although the wording of the provision of Sec. 1 (3) No. 2 AÜG indicates at first glance that corporate privilege will only be inapplicable if both hiring and employment occurred for the purpose of temporary assignments, contrary to the reasoning of the Superior Labor Court, the use of the conjunction “and” does not force one to assume that corporate privilege is only excluded if both elements are present cumulatively. The conjunction “and” can also express an enumeration or a sequence. It does not always and mandatorily necessitate a cumulative understanding.*”

“AND” IS NOT “AND” BUT, RATHER, “OR”

Thus, “and” does not mean “and” but, rather “or”. One may agree with the Federal Labor Court that a cumulative understanding can be seen to lead to the danger of abuse in as much as a “normal employment contract” would be modified immediately after hiring to become a temporary employment contract. However, understanding “and” to mean “or” is nothing short of fanciful. Not only are both terms used consciously and deliberately to either set down a cumulative (“and”) or alternative (“or”) understanding in contracts, but this applies equally in laws.

ERFURT, KARLSRUHE AND THE GERMAN CONSTITUTION

As a private citizen one may find this to be anything from confusing to surprising, but for an employment lawyer this is less the case, as illustrated by two similar examples from the recent past. While the law in Sec. 14 (2) Part-time and Limited Term Employment Act expressly allows the limitation of employment contracts without cause only if no employment relationship had “*previously*” existed between the parties, the court read into this that this only was supposed to apply to

employment relationships over the last three years (Federal Labor Court judgment of April 6, 2011 – 7 AZR 716/06); and whereas the law expressly demands a “written” refusal to grant consent on the part of the works council in Sec. 99 (3) Works Constitution Act – according to Sec. 126 German Civil Code, “in writing” always refers to a signed original – emails, faxes and the like are also supposed to be sufficient (Federal Labor Court of March 10, 2009 - 1 ABR 93/07).

Despite all sympathies for solutions-oriented pragmatism and despite the – cautiously formulated – slowness of law-makers, there are limits: The judiciary is expressly bound under Art. 20 (3) of the German Constitution by the statutes and the law; the memory of the dispute between Erfurt and Karlsruhe regarding the unconstitutional limitation of previous employment in the case of time limitations on employment contracts without cause may still be fresh in some minds (Federal Constitutional Court, order of June 6, 2018 – 1 BvL 7/14 u.a.).

ADVICE FOR BUSINESSES

From a corporate standpoint, one should not rely on another corrective measure from Karlsruhe. It is not possible to merely claim that one is „hiring not to be assigned temporarily“, and the time standards for “employment for temporary assignment” will be pulled into focus. The Federal Labor Court is avoiding a definition of fixed time limits; of governing importance is the oft-cited individual case. For practitioners this means that, following this latest judgment, longer-term temporary assignments should be carefully reviewed in light of their risk levels – from fines to alternative employment relationships, particularly in the event of separation situations – in the meantime, sustainable benchmarks for this review have been established.

Please do not hesitate to contact us if you have questions concerning this topic. If you would like to be included on our mailing list of the subscribers to our free newsletter, please send us a brief [email](#) with your request.

CONTACT



Dr. Daniel Klösel
d.kloesel@justem.de



Dr. Thilo Mahnhold
t.mahnhold@justem.de

www.justem.de